IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

OCTOBER TERM, 1892.

No. 97.

MARIA AMACKER, et al.,

Plaintiffs in error,

vs.

NORTHERN PACIFIC RAILROAD COMPANY,

Defendant in error.

In Error to the Circuit Court of the United States for the District of Montana.

Brief for Defendant in Error.

FRED M. DUDLEY,

For Defendant in Error.

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ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MONTANA.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

This action was brought by defendant in error to recover possession of the south half of the northwest quarter of section 17, township 10 north, range 3 west of the principal meridian of Montana. The defendant in error claims title to said lands under the act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast by the northern route." The

third section of this act provides, among other things, as follows:

"That there be, and hereby is, granted to the "'Northern Pacific Railroad Company,' its suc- "cessors and assigns, * * * every alternate "section of public land, not mineral, designated "by odd numbers, to the amount of twenty alter- "nate sections per mile, on each side of said "railroad line, as said company may adopt, "through the territories of the United States, "and ten alternate sections of land per mile on "each side of said railroad whenever it passes "through any state, and whenever on the line "thereof, the United States have full title, not "reserved, sold, granted or otherwise appropri- "ated, and free from pre-emption or other claims "or rights at the time the line of said road is "definitely fixed, and a plat thereof filed in the "office of the commissioner of the general land "office; and whenever, prior to said time, any of "said sections or parts of sections shall have "been granted, sold, reserved, occupied by home- "stead settlers, or pre-empted, or otherwise dis- "posed of, other lands shall be selected by said "company in lieu thereof, under the direction of "the secretary of the interior, in alternate sec- "tions, and designated by odd numbers, not more "than ten miles beyond the limits of said alter- "nate sections."

The sixth section of said act provides:

"That the president of the United States shall "cause the lands to be surveyed for forty miles "in width on both sides of the entire line of said "road, after the general route shall be fixed, "and as fast as may be required by the construc- "tion of said railroad; and the odd sections of "land hereby granted shall not be liable to sale

"or entry or pre-emption before or after they "are surveyed, except by said company, as pro- "vided in this act."

The company duly accepted the terms, conditions and impositions of this act. February 21, 1872, it fixed the general route of that portion of its road opposite, and within forty miles of the land involved in this action, by filing a plat thereof in the office of the commissioner of the general land office. April 22, 1872, the commissioner of the general land office, under the direction of the secretary of the interior, transmitted to the register and receiver of the United States district land office at Helena, Montana, in which district said land was, a diagram showing the general route of said railroad; and directed them to withhold from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public land falling within the limits of forty miles of such general route. May 6, 1872, this diagram and order were received and filed in the district land office.

October 5, 1868, William M. Scott settled upon, and filed in the said United States district land office at Helena a declaratory statement for, the south half of the northwest quarter and the north half of the southwest quarter of said section 17. This was the only filing or settlement upon the land until William McLean entered it May 3, 1872, over two months after the general route of

the railroad was fixed. Scott built a house on the land in the spring of 1869, and moved into it. Scott's testimony, which was received after objection and exception by plaintiffs in error, establishes that he left the land in the fall of 1869 and did not thereafter return to it. The declaratory statement has never been cancelled and is still of record in the district land office.

May 3, 1872, Wm. McLean applied under the act of congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the acts amendatory thereof, to enter the west half of the northwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of said section 17; and his entry was allowed by the register and receiver. Whether McLean ever settled upon the land does not appear.

December 1, 1874, the commissioner of the general land office wrote to the register and receiver of the United States district land office at Helena, Montana, that the homestead entry of McLean was held for cancellation because made subsequent to the reservation of said land for the railroad company.

July 3, 1879, the register and receiver of the district land office at Helena wrote the commissioner of the general land office that June 2, 1879, McLean had been notified, in accordance with land office circular of December 20, 1873, to show

cause within thirty days why his entry should not be cancelled; that he had not appeared; and recommending the cancellation of said entry.

September 11, 1879, the commissioner wrote the register and receiver, cancelling said entry.

July 6, 1882, the railroad company definitely fixed the line of its road opposite the land and within less than forty miles thereof, and filed a plat of such line in the office of the commissioner of the general land office. Thereafter the road was duly completed.

William McLean died in 1882, and March 15, 1883, his widow, Maria McLean, now Maria Amacker, the plaintiff in error, applied to enter and purchase the land under the provisions of the act of congress approved June 15, 1880, and R. S. § 2291. The railroad company contested this application; but February 20, 1885, the commissioner rendered a decision allowing her to enter, and holding the land was excluded from the railroad grant. The railroad company having appealed to the secretary, this decision was affirmed March 28, 1887. June 17, 1887, a patent was issued to Mrs. McLean for the land. The defendants, other than Mrs. Amacker, claim title by conveyances from her. The land is not mineral and is worth over $20,000.

ARGUMENT.

POINT I.

THE LAND IN CONTROVERSY WAS PUBLIC LAND TO WHICH THE UNITED STATES HAD FULL TITLE, NOT RESERVED, SOLD, GRANTED OR OTHERWISE APPROPRIATED, AND FREE FROM PRE-EMPTION OR OTHER CLAIMS OR RIGHTS, FEBRUARY 21, 1872, AT THE TIME THE GENERAL ROUTE OF SAID ROAD WAS FIXED AND A PLAT THEREOF FILED IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE.

The only settlement or filing upon this land, until subsequent to February 21, 1872, was that of William M. Scott, who settled thereon October 5, 1868, and filed a declaratory statement therefor on the same day.* Scott abandoned the land in the fall of 1869† And unless the mere existence of the declaratory statement on the records constituted a claim or right to the land described therein, or a reservation, sale, grant or appropriation of such land, it must be held that the land was, in every sense, public land February, 21, 1872. The effect of this filing, and the weight to be given thereto, must be determined from the provisions of the pre-emption law as they were at the date of the filing.

This land, like all land in Montana, is "unof-

* Record 24, 27.

† Record 27.

fered land," that is, it has never been proclaimed for sale. Of this the court takes judicial notice.*

Elling v. *Thexton*, (Mont.) 16 Pac. Rep. 934.

U. S. v. *Williams*, (Mont.) 12 Pac. Rep. 853-4

Knight v. *U. S. Land Association*, 142 U. S. 161.

Kirby v. *Lewis*, 39 Fed. Rep. 77.

Section 10 of the act of congress approved September 4, 1841, 5 Stat. 455, provides that "From and after the passage of this act, every person being the head of a family, or widow, or single man, over the age of twenty-one years, and being a citizen of the United States or having filed his declaration of intention to become a citizen as required by the naturalization laws, who since the first day of June, A. D. eighteen hundred and forty, has made or shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding one hundred

* "Courts take judicial notice of the following facts * * Public and private official acts of the legislative, executive and judicial departments of this territory, and of the United States."

Section 643, Code of Civil Procedure, Complied Statutes of Montana, 1887.

and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions: No person shall be entitled to more than one pre-emptive right by virtue of this act; no person who is the proprietor of three hundred and twenty acres of land in any state or territory of the United States, and no person who shall quit or abandon his residence on his own land to reside on the public land in the same state or territory, shall acquire any right of pre-emption under this act."

Section 12 of the same act requires that "prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvement thereby required, shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie."

Section 13 requires "that before any person claiming the benefit of this act shall be allowed to enter such lands" he or she must make oath to certain things set forth in the section, among which is that he has not settled upon or improved the land to sell the same on speculation, but in good faith to appropriate it to his, or her, own exclusive use or benefit.

Section 15 requires "that whenever any person has settled or shall settle and improve a tract of land, subject at the time of settlement to private entry, and shall intend to purchase the same under

the provisions of this act, such person shall, in the first case, within three months after the passage of the same, and in the last within thirty days next after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit, and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

Section 5 of the act of congress approved March 3, 1843, 5 Stat. 619, provides "That claimants under the late pre-emption law, for land not yet proclaimed for sale, are required to make known their claims, in writing, to the register of the proper land office, within three months from the date of this act when the settlement has been already made, and within three months from the time of the settlement when such settlement shall hereafter be made, giving the designation of the tract, and the time of settlement; otherwise his claim to be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice,

and otherwise complied with the conditions of the law."

These provisions of the pre-emption law remained unchanged until the passage of the act of July 14, 1870, 16 Stat. 279.

Instructions of March 10, 1869, 2 Lester's L. L. 241.

And Scott's declaratory statement was filed under the provisions of this act of 1843.

[A.] A FILING, WITHOUT MORE, DOES NOT ATTACH A CLAIM OR RIGHT TO LAND.

The filing of a declaratory statement does not constitute an entry of the land. The distinction between the entry and the declaratory statement, under the pre-emption law, is very marked, and care should be taken not to confuse the two.

The Entry.

The entry is only made "upon paying to the United States the minimum price for such land." As a condition precedent thereto, the settler is required to "make proof of the settlement and improvement required;" and to "make oath before the register and receiver" of his or her qualifications. Twelve months are allowed from the date of settlement in which to make the entry on offered lands; on unoffered lands the time was, until July 14, 1870, limited only by the proclamation of the lands for sale. A valid pre-emption entry vests the entryman with an equitable title to the land entered, of which not even congress can deprive

him. The entry, whether made under the preemption, homestead, or other public land law, operates to segregate the land entered from the mass of public lands. It reserves and appropriates the land. Its allowance requires the exercise of *quasi* judicial functions on the part of the land officers; and if the land be subject to entry, their decision, until reversed by their superior officers, and the entry cancelled, preserves the land from other disposition.

H. & D. R. R. Co. v. *Whitney*, 132 U. S. 363-4.

Reservation of Land for Public Uses, 17 Op. Atty. Gen. 160.

Cornelius v. *Kessel*, 128 U. S. 460.

Simmons v. *Wagner*, 101 U. S. 261.

Witherspoon v. *Duncan*, 4 Wall. 218

U. S. v. *Steenerson*, 4 U. S. App. 343. 1 C. C. A. 555.

Smith v. *Ewing*, 23 Fed. Rep. 743.

Wilson v. *Fine*, 40 Fed. Rep 53.

Stimson v. *Clarke*, 45 Fed. Rep. 760.

Am. Mtge. Co. v. *Hopper*, 48 Fed. Rep. 47.

Kate Cox, 1 L. D. 52.

Whitney v. *Maxwell*, 2 L. D. 98.

Henry Cliff, 3 L. D. 217-218.

St. P. M. & M. R'y Co. v. *Forseth*, 3 L. D. 446.

Legan v. *Thomas, et al*, 4 L. D. 441.

Nyman v. *St. P. M. & M. R'y Co.*, 5 L. D. 396.

Grove v. *Crooks*, 7 L. D. 140.

James A. Forward, 8 L. D. 528.

Etnier v. *Zook*, 11 L. D. 452.
Leary v. *Manuel*, 12 L. D. 345.
Swims v. *Ward*, 13 L. D. 686.
Mathias Ebert, 14 L. D. 589.

The Filing.

The declaratory statement, o notice of intention to claim the land must, if the land be offered land, be filed within thirty days from settlement; for unoffered land, within three months from such time. It is a brief written notice, giving the date of the alleged settlement, the description of the land, and declaring the intention of the settler to claim the land under the pre-emption laws. It may be, and frequently is, transmitted to the local office by mail, or by agent, and is filed without the officers ever seeing the alleged settler, * or

* In a letter written October 23, 1857, the commissioner of the general land office says, "the declaratory statement need not be filed in person. The settler must file a written statement signed by himself or his duly authorized attorney. It may be transmitted by mail, or entrusted to an agent, but in either case, at the risk of the settler," (1 Lester's Land Laws, 464).

The commissioner in his annual report for 1885, speaking of declaratory statements, says: "These are pre-emption filings, which have never been required by office regulations to be authenticated even by a 'land office oath.' A simple 'declaration of intention,' purporting to be signed and witnessed, is all that is required to put a claim on record. The filings are not required by regulations to be made in person; they may be sent through the mails, and are sent, not only from within, but from without land districts, and even from distant states, where the parties are not settlers on public lands, as claimed, have never seen the lands for which the filings are made, and have never been in the state or territory in which the lands lie; and speculators cover the records with such filings." Page 70.

The form of declaratory statement prescribed by the interior department, is shown in Scott's D. S., on page 27-8 of the record.

The method of keeping a record of these declaratory statements in the land offices is prescribed in Circulars of Instructions issued

having any knowledge of the facts recited in the declaratory statement.

The filing of the statement does not represent a determination by the officers upon any of the recitals contained in the statement. They do not, as a condition precedent to allowing the filing, pass upon the qualifications of the declarant, or determine if he has made a settlement as alleged. Indeed, the statement is not required to allege facts sufficient to show that the declarant is qualified to enter land under the pre-emption

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September 15, 1841, and May 8, 1843. Under the act of September 4, 1841, a declaratory statement was not required for unoffered lands. In circular of September 15, 1841, the district land officers were instructed as follows:

"Where the land was subject to private entry at the date of the settlement made since 1st June, 1840, and prior to the passage of this act, and the settler is desirous of securing the same under this act, he must give notice of his intention to purchase the same under its provisions within three months from the passage of the law; that is, before the fourth day of December, next.

[Where the land was subject to private entry at the date of the law, and a settlement shall thereafter be made upon such land, or] where the land shall hereafter become subject to private entry, and after that period a settlement shall be made, which the settler is desirous of securing under this act, such notice of his intention must be given within thirty days after the date of such settlement. Such notice, in both (all) cases must be a written one, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act.

In the first case the proof, affidavit, and payment must be made within twelve months after the passage of this act; and in the second case, within twelve months after the date of such settlement.

These declaratory statements are to be regularly numbered by the register in the order of the date of their reception, and entered in a suitable book, columned off, to show the number, date when received, name of the party, and description of the tract claimed; and monthly abstracts of the same are to be furnished to the general land office, with your other monthly returns.

The existence of these claims should be indicated on the township plats by marking, with red ink, a cross (†) on the spot occupied by the tract claimed; and, also, with red ink, noting on the same

laws. The only question the officers are called upon to determine in filing a declaratory statement, is whether or not the land is public. The existence of a filing of record, therefore, unlike an entry, does not evidence a decision by the officers upon the facts recited in the statement. In this respect the declaratory statement bears to the entry a relation somewhat analogous to that borne by a complaint to a judgment.

The filing of a declaratory statement does not operate to reserve or appropriate the land de-

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spot the number of the declaratory statement, in neat and very small figures, so as not too much to interfere with the regular annotations which will have to be made when the regular proof and payment shall have been made by the claimant, and his entry of the tract consummated. The existence of such claims should also be noted, in pencil, in their appropriate places in the tract books." (1 Lester L. L. 362-3).

The act of March 3, 1843, having required declaratory statements to be filed for unoffered lands, the following additional instructions were issued March 8, 1843:

"The fifth section requires that similar notices or declarations in writing should be filed by settlers under the act of 4th September, 1841, on land not subject to private entry. These declarations are to be filed in your office by every such settler within three months after his settlement, except as to those whose settlements were made prior to the 3d March last; in which cases, such declarations are to be filed within three months from that date, viz.: before the 3rd June next. The register will number such statements regularly in the order of their date of reception, enter them in a suitable book prepared therefor, furnish this office with monthly abstracts from said book, and in all other respects pursue the same course in relation to them as he is required to do by the 3rd and 4th paragraphs on the second page of the circular of 15th September, 1841, in regard to the declarations therein referred to. Particular care must be taken not to confound the two species of declarations, but to keep separate files thereof, enter them in the respective books prepared for each, and in the monthly abstracts transmitted to this office, discriminate between the two by heading the one 'For land subject to private entry' and the other 'For land not yet offered for sale. " (1 Lester's L. L. 371).

This practice remains unchanged.

scribed therein, or to take it out of the category of public lands. The filing, if made by one qualified to enter the land under the pre-emption laws, confers a mere preference right of purchase as against third persons, if the land is disposed of under the public land laws; but it confers no rights as against the United States; and the land covered by such filing remains public land, open to either settlement or entry by any qualified person, subject to the possible exercise by the filer of his preference right of purchase.

Reservation of Lands for Public Uses, 17 Op. Atty. Gen. 160.

Forbes v. *Driscoll*, (Dak.) 31 N. W. Rep. 636.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 72.

Hemphill v. *Davies*, 38 Cal. 578.

Decision of Commissioner, dated Sept. 1, 1868, Zabriskie's Land Laws, 85.

Thomas v. *Drumhiller*, 1 L. D. 486,

Field v. *Black*, 2 L. D. 581.

State of Alabama, 3 L. D. 315.

Iddings v. *Burns*, 8 L. D. 224.

Walter v. *Davis*, 9 L. D. 262.

The filing of Scott was, consequently, without effect so far as the railroad grant was concerned, except in so far as it may have operated to attach to the land a "pre-emption or other claim or right." *

* The distinction between entries and filings is of the utmost importance in the case at bar; and in examining the decisions with reference to these questions, it should be kept in mind. In K. P. Ry. Co. v. Dunmeyer, 113 U. S. 629; McIntyre v. Roeschlaub et al,

In the phrase "pre-emption or other claims or rights," a pre-emption is considered indifferently as either a claim or a right. Throughout railroad land grant legislation "right of pre-emption" "pre-emption right" and "pre-emption claim" are treated as synonomous terms, and are used indifferently to designate the claim or right aris-

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37 Fed. Rep. 556; H. & D. R. R. Co. v. Whitney, 132 U. S. 357; and Sioux City etc. Land Co. v. Griffey, 143 U. S. 32, Bardon v. N. P. R. R. Co. 145 U. S. 535, 545; the lands held excluded from the grants there in question, were excluded by entries.

The reasoning of the court in H. & D. R. R. Co. v. Whitney, holding a voidable entry would exclude land from a grant; "but these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants," cannot apply to a pre-emption filing. And see: Newhall v. Sanger, 92 U. S., 761; McIntyre v. Roeschlaub et al, 37 Fed. Rep. 556; Bardon v. N. P. R. R. Co. 145 U. S. 540, 545; St. P. M. & M. Ry. Co. v. Forseth, 3 L. D. 446; St. P. M. & M. Ry. Co. v. Leech, 3 L. D. 506; Hollants v. Sullivan, 5 L. D. 115; W. & St. P. R. R. Co. 9 L. D. 653-4. S. P. R. R Co. v. Cline, 10 L. D. 31; St. L. & I. M. R. R. Co. 13 L. D. 560. Compare the following decisions with reference to pre-emption filings: N. P. R. R. Co. v. Meadows, 46 Fed. Rep. 254; Cahalan v. McTague, 46 Fed. Rep. 251. (In this case what is inadvertently called an "entry" made June 13, 1878, was a D. S. filing); McLaughlin v. Menotti, (Cal.) 26 Pac. Rep. 882; Sioux City etc. Land Co. v. Griffey, 143 U. S. 41; Claim of Lutz's Heirs, 9 Op. Atty. Gen. 515; 1 Copp's L. O. 29; 6 Copp's L. O. 142; Caldwell v. M. K. & T. R. R. Co. 8 L. D. 570; Allers v. N. P. R. R. Co. 9 L. D. 452; N. P. R. R. Co. v. Stovenour, 10 L. D. 648; N. P. R. R. Co. v. Moling, 11 L. D. 130; Kricklan v. St. P. & S. C. R. R. Co. 13 L. D. 22; N. P. R. R. Co v. Flett et al, 13 L. D. 617; Meister v. St. P. M. & M. Ry. Co., 14 L. D. 624. A declaratory statement is some times spoken of as "*prima facie* valid" "valid upon its face" or "voidable." The use of these terms ignores at once the nature and definition of a declaratory statement, and the definition of the terms used. A declaratory statement, as the name indicates, is a statement and nothing more. It can no more be "valid" or "*prima facie* valid" or "valid on its face" or "invalid" or "voidable" or "void" than can an affidavit or any other statement of facts.

ing under the pre-emption law, which, by having attached to the land, excludes it from the grant.

The first act granting lands to aid in the construction of a railroad was the act of September 20, 1850, entitled "An act granting the right of way, and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile," 9 Stat. 466. By this act it was provided:

> "In case it shall appear that the United States "have when the line or route of said road and "branches is definitely fixed by the authority "aforesaid, sold any part of any section hereby "granted, or that the right of pre-emption has "attached to the same," lieu lands shall be "selected "equal to such lands as the United "States have sold, or to which the right of pre-"emption has attached as aforesaid. * * * "

Substantially this same formula, using the term "right of pre-emption" is used in many of the subsequent railroad grants.

> Act of June 10, 1852, 10 Stat. 8; act of February 9, 1853, 10 Stat. 155; act of June 29, 1854, 10 Stat. 302; act of May 15, 1856, 11 Stat. 9; act of May 17, 1856, 11 Stat. 15; acts of June 3, 1856, 11 Stat. 17; id. 18; id. 20 id. 21; act of August 11, 1856, 11 Stat. 30; act of March 3, 1857, 11 Stat. 195; act of March 3, 1863, 12 Stat. 772; act of March 3, 1863, 12 Stat. 797; act of May 5, 1864, 13 Stat. 64; id. 66; act of May 12, 1864, 13 Stat. 72; act of June 25, 1864, 13 Stat. 183; act of July 1, 1864, 13 Stat. 339; act of April 10, 1866, 14 Stat. 30; act of July 4, 1866, 14 Stat. 83; id. 87; act of July 23, 1866, 14 Stat.

210; act of July 25, 1866, 14 Stat. 236; act of July 26, 1866, 14 Stat. 289; act of July 28, 1866, 14 Stat. 338; act of December 26, 1866, 14 Stat. 374.

In other acts the term used is "pre-emption claim." Thus in the act approved July 1, 1862, 12 Stat. 489, there is granted every alternate section, etc., "to which a pre-emption or homestead claim may not have attached." And see:

Act of June 2, 1864, 13 Stat. 95; act of July 2, 1864, 13 Stat. 356; and act of March 3, 1871, 16 Stat. 573.

These acts were all passed pursuant to an uniform policy, and are to be construed *in pari materia*.

"The internal improvement grants are all of "the same general character, having the same "great object in view, and are all part of one "grand system, and laws having in view the "same general purpose should be construed *in* "*pari materia* unless the intention of the legis- "lature is plainly shown to be otherwise. "Indeed, where no ambiguity exists in the law, "it should be read in the light of the uniform "construction of the other acts relating to the "same subject."

N. P. R. R. Co. Unpublished Opinion of Secretary Lamar, delivered August 15, 1887.

Where laws are enacted pursuant to a common policy, it will be presumed, in the absence of evidence to the contrary, that congress intended a similar construction to be placed upon analogous provisions therein. An intention to change such

policy should not be imputed to congress, unless the law will admit of no other construction.

Morton v. *Nebraska*, 21 Wall. 669, 671.

Mining Co. v. *Consolidated M. Co.*, 102 U. S. 167.

U. S. v. *Gear*, 3 How. 130.

State v. *Springfield*, 6 Ind. 88, *et seq.*

N. P. R. R. Co. v. *St. P. M. & M. R'y Co.*, 26 Feb. Rep. 557-8.

There is nothing in the history of these various acts, nor in the debates of congress with reference thereto, to indicate any intention to change the policy with reference to what should be sufficient, under the pre-emption law, to exclude lands from these grants. The term "right of pre-emption" had been found sufficient to protect every claim or right which congress had considered entitled to protection. The use of the term "pre-emption claim" in some of the later acts was not to remedy some defects shown by experience in the earlier acts, nor did it indicate a change in the policy of congress with reference to the nature of the interests protected. The contemporaneous enactment of laws in which the original term is used unmodified, forbids such a conclusion. And the act approved June 2, 1864, 13 Stat. 95, is conclusive that congress in these granting acts uses the terms as synonomous. This act is an amendment to the act of May 15, 1856, 11 Stat. 9, making a railroad grant from which was excepted lands to which "the right of pre-emption had attached;" and it uses the terms "pre-emption

claim" and "pre-emption right" indifferently; and both are used as synonomous with the "right of pre-emption" referred to in the original grant. *

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* As showing the congressional use of "pre-emption claim" and "pre-emption right" as synonomous, attention may be called to the debates in congress with reference to the Union Pacific act of July 2, 1864. Section 6 of a substitute introduced in the senate provided, among other things:

"That there be, and hereby is, granted to said company * * * every alternate section of the public land, designated by odd numbers, * * * to which a *pre-emption or homestead claim* may not have attached at the time the line of said road is definitely fixed; but if by reason of sale by the United States or by *pre-emption or homestead right* attaching to any such alternate section or part of a section so hereby granted * * * it shall be lawful for said company to select, locate and receive patents for so much of the other lands * * * as will make up the quantity granted to said company."

Congressional Globe, 1st Sess. 38th Cong., p. 2328.

May 21, 1864, Senator Harlan moved to amend said section to make it read:

"But if by reason of sale by the United States, or by *pre-emption or homestead right*, attaching to any such alternate section or part of a section so hereby granted * * * it shall, in either case, be lawful for said company to select, locate and receive patents for so much of the other public lands of the United States not sold, reserved, or otherwise disposed of, and to which a *pre-emption or homestead claim* may not have attached as aforesaid. * * * "

The amendment was adopted. Congressional Globe, 1st Sess. 38 Cong., p. 2398.

The act as finally approved omitted entirely the indemnity provisions.

This use of the term "pre-emption claim" is a common one.

"A pre-emption claim may be defined to be a right or interest subsisting, under the pre-emption law, in some person, to a tract of public land, which, by a further full compliance with the law, may be ripened into a perfect title."

W. P. R. R. Co. v. Spratt, Copp's Pub. Land Laws, 416.

"And so in numerous other sections is the right of pre-emption entry spoken of as a *claim*. It is frequently spoken of as a *right*. It is by the law a right demandable, to be exercised under the provisions and conditions of the law."

U. S. v. Spaulding, (Dak.) 13 N. W. Rep 260.

"I may say further I do not think the fact of making a filing alone of an application to pre-empt land, unaccompanied by any other acts ought to be considered a pre-emption claim at all, as that term is understood in law."

N. P. R. R. Co. v. Meadows, 46 Fed. Rep. 255.

The interior department has never made a distinction between those grants where the term employed is "pre-emption right," and those where it is "pre-emption claim." For over thirty years these terms, as used in the railroad grants, have by that department, been construed as synonomous. Upon that construction hundreds of cases have been decided, the title to thousands of acres depends, and it should not now be disturbed unless clearly wrong.

"The principle that the contemporaneous construction of a statute by the executive officers "of the government, whose duty it is to execute "it, is entitled to great respect, and should "ordinarily control the construction of the statute by the courts, is so firmly imbedded in our "jurisprudence, that no authorities need be cited "to support it."

Pennoyer v. *McConnaughy*, 140 U. S. 23.

Heath v. *Wallace*, 138 U. S. 582.

U. S. v. *Philbrick*, 120 U. S. 59.

U. S. v. *B. & M. R. R. Co.*, 98 U. S. 341.

U. S. v. *Graham*, 110 U. S. 221.

" 'Claim,' when used as a noun and in relation to land, has, in most of the states, a signification beyond that of a mere demand—a right not reduced to enjoyment but to be enforced against another—but it is used as well to express all the rights which a person holds and enjoys in the land. Pre-emption claims, homestead claims, and mining claims are familiar instances."

Marshall v. Shafter, 32 Cal. 191.

"A pre-emption claim is a lawful claim because regularly initiated under the laws of the country."

McLaughlin v. Menotti, (Cal.) 26 Pac. Rep. 882.

"A claimant is one having some interest in the land, which is recognized by the laws of the United States."

W. P. R. R. Co. v. Tevis, 41 Cal. 494.

This word (claim) is, in all legislation of congress on the subject, used in regard to a claim not yet perfected by a title from the government by way of a patent."

Iron-Silver Min. Co. v. Campbell, 135 U. S. 299.

The Laura, 114 U. S. 416.
U. S. v. *Moore*, 95 U. S. 763.
Brown v. *U. S.* 113 U. S. 571.
Robertson v. *Downing*, 127 U. S. 613.
H. & D. R. R. Co. v. *Whitney*, 132 U. S. 366.

A declaratory statement does not create a "pre-emption claim" or "right of pre-emption," nor does the mere filing of such statement attach such right to the land.

"The right of pre-emption is the right to enter "lands at the minimum price in preference to "any other person, if all the requirements of the "law are complied with. The prior settlement, "*declaratory statement*, and proof are *not* the "pre-emption, *but only the means of securing* "*the right of pre-emption*"
Nix v. *Allen*, 112 U. S. 136.

"It is, simply, the right which a person, who "has complied with certain requirements of the "law, has to purchase a portion of the public "lands at the minimum price to the exclusion of "all others. It is wholly a creature of the "statute, and is exercised and exhausted as soon "as the purchase and entry are made."
Camp v. *Smith*, 2 Minn. 138 (Gilf.)
McKean v. *Crawford*, 6 Kas. 118.
Myers v. *Croft*, 13 Wall. 296.
Aiken v. *Ferry*, 6 Saw. 87.
Dillingham v. *Fisher*, 5 Wis. 480.
J. B. Raymond, 2 L. D. 854.

The fourth section of the act of July 2, 1864, 13 Stat. 356, granting lands to the Union Pacific, provides:

"Any lands granted by this act, or the act to "which this is an amendment, shall not defeat "or impair any pre-emption, homestead, swamp "land, or *other lawful claim.*"

This is a congressional definition of a "pre-emption claim," as a lawful claim; and is conclusive as to the sense in which congress employed the term. And it must be taken in the same sense in the Northern Pacific act.

"If it can be gathered from a subsequent "statute *in pari materia*, what meaning the "legislature attached to the words of a former "statute, they will amount to a legislative dec-"laration of its meaning, and will govern the "construction of the first statute."

U. S. v. *Freeman*, 3 How. 564.

Philadelphia, etc., R. R. Co. v. *Catawissa R. R. Co.*, 53 Pa. St., 20, 39, 60.

U. S. v. *Gilmore*, 8 Wall. 330.

U. S. v. *Alexander*, 12 Wall. 180-1.

U. S. v. *Mynderse*, 7 Blatch. 490.

U. S. v. *Tilden*, 10 Ben. 173.

Johnson v. *Tompkins*, Baldwin, 582.

That this construction of the phrase "pre-emption or other claims or rights" is correct is further confirmed by the indemnity provision. The indemnity-clause provides:

"Whenever, prior to said time, any of said "sections or parts of sections, shall have been "granted, sold, reserved, occupied by home-"stead settlers, or pre-empted, or otherwise dis-"posed of, other lands shall be selected by said "company in lieu thereof."

The obvious purpose of this provision was to provide indemnity for all lands (except mineral) excluded from the grant by the terms of the granting clause. And the enumeration of the various losses for which indemnity is provided, is synonomous with the enumeration of the losses in the granting clause. The excepting terms "reserved, sold, granted," are repeated in the indemnity clause. The terms "occupied by homestead settlers, or pre-empted, or otherwise disposed of" are evidently used as the equivalent of "otherwise appropriated" and not "free from pre-emption or other claims or rights;" and give indemnity for all lands lost from those causes.

A "homestead settler" is a settler who has entered the land under the homestead law by making and filing the proper affidavit, and paying the land office fees in accordance with section 2290 Rev. Stat., but to whom the final certificate has not been issued, five years from the date of such entry not having expired.

A. T. & S. F. R. R. Co v. *Mecklim.* 23 Kas. 174.

R. R. & L. W. R'y Co. v. *Sture*, 32 Minn. 96.

Act of June 8, 1872, 17 Stat. 337.

Frank W. Hewitt, 8 L. D. 566.

The land "occupied by homestead settlers" is land entered, but for which final proof has not been made.

"Otherwise disposed of" refers to an alienation of the title to property; the assignment of it to a particular use. Of the term "dispose" in Abbott's

Law Dictionary it is said: "To dispose of property is to alienate it; to assign it to a use; bestow it; direct its ownership. Disposal or disposition; an act bestowing property, or directing its future ownership."

And the term employed in the indemnity clause as descriptive of the lands not "free from pre-emption claims or rights" is "pre-empted." Until, therefore, the land is "pre-empted" it is free from "pre-emption claim or rights."

The term "pre-empted" is further modified by the words "or otherwise disposed of." The use of the words "or otherwise" indicates the understanding by congress that the term "pre-empted" meant a disposition of the land; and is conclusive that it was here used as descriptive of the attachment of such a claim to the land under the pre-emption law as amounted to a disposition of the land.

The claim or right arising under the pre-emption law, which congress desired to protect by excluding the lands to which it had attached, from the grant, was, therefore, a lawful claim or right, * that is, it was a claim or right vesting

* It has been said that the term "lawful" cannot be imported to modify the words "claims or rights." This is true. But if congress used the terms as indicative of "lawful" claims (and it expressly so declares in the Union Pacific act of July 2, 1864), the restriction of the term to the sense in which it was used, does not violate the rule. It has, further, sometimes been said that in Newhall v. Sanger, 92 U. S. 761, the supreme court held that a "claim" need not be lawful to exclude land from a grant like that to the Union Pacific. Such statement ignores the facts of that case, and entirely misconstrues the decision. In that case it was held that the act of March 3, 1851, 9 Stat. 631, and of March 3, 1853,

in the settler, and attaching to the land by virtue of the pre-emption law, as a result of certain acts performed by him. The pre-emption law gave a right of pre-emption, or pre-emption claim, to that person only who possessed certain qualifications described in the act; that is, who was a citizen of the United States, or had declared his intention to become such, and was the head of a family, or over twenty-one years of age; who had never previously exercised the pre-emptive right, and had

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10 Stat. 244, created a reservation of all "lands *claimed* under any foreign grant or title." And it was in connection with this verb "claimed" as used in the act of 1853, that it was held to be immaterial whether lands were lawfully claimed or not. As long as they were "claimed" they were, by the acts of 1851 and 1853, "reserved" and the reservation was valid. And it was because they were "reserved" that they were held excluded from the grant; not because a claim had attached thereto, within the meaning of the railroad act. U. S. v. McLaughlin, 127 U. S. 454. The "claims" referred to in that act were expressly defined to be "lawful claims." The case is like H. & D. R. R. Co. v. Whitney, 132 U. S. 357, where the court held a voidable entry excluded land from a grant because, until cancelled, it was "such an *appropriation of the land as segregates it from the public domain.*" Nor has the supreme court ever questioned the right of a railroad company to show, for the purpose of establishing its title to land, that an apparent claim thereto, existing at the date of definite location, was, in fact, an unlawful claim, and not within the meaning of the exception.

The statement in the case of K. P. Ry. Co. v. Dunmeyer, 113 U. S. 641, and H. & D. R. R. Co. v. Whitney, 132 U. S. 357, that it was not the intention of congress to create by these grants a contestant with an interest to defeat individual claims, was in answer to an argument that the railroad company took lands not free from claims or rights at the date of grant or definite location, subject to such claims or rights; and by the extinguishment thereof without ripening into a perfect title, acquired title to the land. Bardon v. N. P. R. R. Co. 145 U. S. 544. To quote such a statement in support of an argument that congress did not intend the railroad company to show, by contest, if necessary, that an apparent claim was not, at the date of the grant or definite location, a lawful claim and within the meaning of the term as used in the grant to designate the exceptions, is an unwarranted perversion of these decisions.

not abandoned a residence on his own land in the same state or territory; and was not the proprietor of 320 acres of land in any state or territory. And the filing of a declaratory statement by one not possessing such qualifications would not attach to the land a pre-emption or other claim or right.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 70, 72, 73.

N. P. R. R. Co. v. *Meadows*, 46 Fed. Rep. 255.

Tatro v. *French*, (Kas.) 5 Pac. Rep. 426.

Boyce v. *Danz*, 29 Mich. 149-50.

Nix v. *Allen*, 112 U. S. 136-7.

Sanford v. *Sanford*, 139 U. S. 648.

Aiken v. *Ferry*, 6 Saw. 86-87.

McLaughlin v. *Menotti*, (Cal.) 26 Pac. Rep. 880.

Page v. *Hobbs*, 27 Cal. 486-7.

Quinn v. *Kenyon*, 38 Cal. 501-2.

Baldwin v. *Stark*, 107 U. S. 464.

W. P. R. R. Co. v. *Spratt*, Copp's Pub. Land Laws, 416.

Circular of November 7, 1871, Copp's Pub. Land Laws, 405.

Circular of August 15, 1872, Copp's Pub. Land Laws, 389.

McOuat v. *W. & St. P. R. R. Co.*, 4 Copp's L. O. 163.

Vincent v. *St. J. & D. C. R. Co.*, 4 Copp's L. O. 44.

Freeman v. *T. & P. R. R. Co.*, 2 L. D. 550.

McComber v. *C. & O. R. R. Co.*, 2 Copp's L. O. 163.

Walker's Heirs v. *California*, Copp's Pub. Land Laws, 287.

Weber v. *W. P. R. R. Co.*, 6 Copp's L. O. 19.

McMurdie v. *C. P. R. R. Co.*, 8 Copp's L. O. 36.

Blodgett v. *C. & O. R. R. Co.*, 6 Copp's L. C. 37.

Emerson v. *S. P. R. R. Co.*, 1 L. D. 390.

Mary Lewis, 3 L. D. 187.

Ross v. *Poole*, 4 L D. 116.

S. P. R. R. Co. v. *Saunders*, 6 L. D. 100.

The burden of showing such qualifications is, necessarily, upon the one asserting that such right had attached to the land. The presumption is that land remains public land, free from all claims or rights, and until the contrary is shown by evidence making at least a *prima facie* case, that presumption must control.

Patterson v. *Tatum*, 3 Saw. 170.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 72-3.

Megerle v. *Ashe*, 33 Cal. 84, 90.

Dunn v. *Schneider*, 30 Wis. 512.

McComber v. *C. & O. R. R. Co.*, 2 Copp's L. O. 163.

Walker's Heirs v. *California*, Copp's Pub. Land Laws 287.

Vincent v. *St. J. & D. C. R. R. Co.*, 4 Copp's L. O. 44.

S. P. R. R. Co. v. *Wiggins & Kellar*, 4 Copp's L. O. 123.

McOuat v. *W. & St. P. R. R. Co.*, 4 Copp's L. O. 163.

Weber v. *W. P. R. R. Co.*, 6 Copp's L. O. 19.

Blodgett v. *C. & O. R. R. Co.*, 6 Copp's L. O. 37.

McMurdie v. *C. P. R. R. Co.*, 8 Copp's L. O. 36.

Freeman v. *T. & P. R. R. Co.*, 2 L. D. 550.

S. P. R. R. v. *Saunders.* 6 L. D. 98.

The declaratory statement, being a mere statement, is not evidence as against the government or third parties, of any of the facts recited therein, or of anything other than that such a statement was filed; and it is not admissible to show, as against the railroad company, the qualifications of the declarant.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 70, 72 and 73.

Megerle v. *Ashe*, 33 Cal. 84-5, 90.

Barr v. *N. P. R. R. Co.*, 7 L. D 235.

N. P. R. R. Co. v. *Beck*, 11 L. D. 584.

N. P. R. R. Co. v. *Kranich*, 12 L. D. 384.

Schiefferly v. *Tapia*, (Cal.) 8 Pac. Rep. 878.

Hardenburg v *Lakin et al.*, 47 N. Y. 111.

Hill v. *Draper*, 10 Barb. 462-3.

Sharp v. *Spier*, 4 Hill 86.

Carver v. *Jackson*, 4 Pet. 83.

As there is no evidence showing, or tending to show, that Scott was qualified to pre-empt land, the pre-emption filing does not show that a pre-emption right or claim ever attached to the land in favor of Scott.

[B.] SCOTT ABANDONED HIS CLAIM OR RIGHT, IF ANY HE EVER ACQUIRED, PRIOR TO FEBRUARY 21, 1872, AND BY THAT ABANDONMENT THE LAND BECAME FREE THEREFROM.

The declaratory statement does not reserve or appropriate the land, even if made by a qualified settler; and it attaches a claim or right to the land only so long as the claim or right exists. When that ceases, from any cause, the land at once becomes free therefrom, notwithstanding the filing remains of record. The filing, being a mere notice of the claim, is without effect after the claim itself is extinguished. It was within the power of Scott to abandon his claim or right, if one he had, at any time.

Nix v. *Allen*, 112 U. S. 130, 136.

1 Am. & Eng. Encyclopedia of Law, title Abandonment.

N. P. R. R. Co. v. *Meadows*, 46 Fed. Rep. 255.

Cahalan v. *McTague*, 46 Fed. Rep. 252.

S. P. R. R. v. *Dull*, 22 Fed. Rep. 497-8.

Keane v. *Brygger*, (Wash.) 28 Pac. Rep. 654-5.

Bohall v. *Dilla*, 114 U. S. 51.

Pickett v. *Dowdall*, 2 Wash. (Va.) 106, 114.

Young v. *Goss*, (Kas.) 22 Pac. Rep. 572.

Emslie v. *Young*, 24 Kas. 739.

Ard v. *Pratt*, (Kas.) 23 Pac. Rep. 646.

Ard v. *Brandon*, (Kas.) 23 Pac. Rep. 648.

Davis v. *Butler*, 6 Cal. 511.

Fine v. *Public Schools*, 30 Mo. 166.

Eckart v. *Campbell*, 39 Cal. 256, 259.

Gluckauf v. *Reed*, 22 Cal. 471.

Pre-emption claim of James M. Slaughter, 4 Op. Atty. Gen. 640.

Titus v. *Bull, et al*, 1 L. D. 404.

N. P. R. R. Co. v. *Hess*, 2 L. D. 474.

Neilson v. *N. P. R. R. Co.*, 9 L. D. 402.

N. P. R. R. Co. v. *Flett*, 13 L. D. 617.

Van Deeren v. *Hoover*, 13 L. D. 323.

"Rights in the public lands of the United "States can only be gained either for agricultural "or municipal purposes by settlement, improve- "ment and occupancy, or in other words, by "acts of physical possession, and such rights, "until consummated by entry under the appro- "priate acts of congress, may always be aban- "doned by mere withdrawal, leaving the lands "open to any other party who desires to settle "and improve them."

Weisberger v. *Tenny*, 8 Minn. 409 (Gilf.).

The evidence shows that Scott exercised this power prior to February 21, 1872.

(*a.*) October 20, 1869, Scott filed a second declaratory statement, purporting to amend his original filing. * This second filing did not embrace an entirely separate and distinct parcel of land. The land here in controversy was included in each, but there was such a change in the original tract filed for, considered as an entirety, as to justify the designation of the land included in the second filing as a different tract. This constituted an abandonment of the first filing.

Sanford v. *Sanford*, 139 U. S. 648.

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* Record 24.

(*b.*) In the fall of 1869, Scott left the land and did not return to it; * and the court finds as a fact that Scott abandoned the land at that time. † The question of abandonment is one of fact for the jury. And the court, sitting without a jury, having found that fact, the finding, if there be evidence to warrant it, will not be disturbed.

Nor is the sufficiency of the evidence to show the abandonment questioned. The objections of plaintiffs in error to the evidence of the abandonment offered, are based entirely upon the theory that the abandonment itself is not material.

We have seen that the right, being inchoate, can be abandoned. By the abandonment, all right or claim of Scott thereto ceased. As a filing does not operate to appropriate or reserve land, or segregate it from the public domain, ‡ when the right or claim of Scott was extinguished by his abandonment, the land became public, although

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* Q. When did you leave, if at all?

A. I left in the fall of 1869.

Q. Did you afterwards return to the land?

A. No, sir.

Each question was objected to as incompetent and immaterial, for the reason that the filing appeared of record and was valid on its face. The objections were overruled: to which ruling the defendants excepted. (Record 27.)

† Eleventh finding of fact: "That in the year 1869 the said Scott built a cabin on said premises and lived there until the fall of that year, when he moved to the city of Helena, Montana, and continued to live in Helena until the year 1878, when he removed to the city of Butte, Montana, that he never returned to said land after leaving it in the fall of 1869, and never exercised any act of ownership over the same, and on said date abandoned the same." (Record 40.)

‡ See pages 14, 15, supra.

the declaratory statement remained of record, uncancelled. It is not the practice of the department to cancel such filings of record.

Circular of September 8, 1873, 1 Copp's L. O. 29.
Circular of November 7, 1879, 6 Copp's L. O. 142.
State of Alabama, 3 L. D. 317-8.
Circular of June 4, 1885, 3 L. D. 576.
N. P. R. R. Co. v. *Flett, et al*, 13 L. D. 619.

(C.) The claim or right of Scott, if any he had, expired by limitation of law, prior to February 21, 1872.

Section 15 of the act of September 4, 1841, requires the settler on offered land to make entry thereof within twelve months from the date of settlement; and if he or she should "fail to make such affidavit, proof and payment, within the twelve months aforesaid, the tract of land so settled and approved shall be subject to the entry of any other purchaser." On unoffered lands final proof or entry was required to be made prior to their being offered for sale.

By the act approved July 14, 1870, 16 Stat. 279, congress provided:

> "All claimants of pre-emption rights shall "hereafter, when no shorter period of time is "now prescribed by law, make the proper proof "and payment for the lands claimed, within "eighteen months after the date prescribed for "filing their declaratory notices shall have "expired; *provided*, that where said date shall "have elapsed before the passage of this act,

"said pre-emptors shall have one year after the "passage hereof in which to make such proof "and payment."

By this act Scott was required to make the proper proof and payment by July 14, 1871.

By a joint resolution approved March 3, 1871, 16 Stat. 601, entitled "A resolution for the relief of settlers on the public lands," congress provided:

"That settlers on the public lands of the United "States who have been required to make proof "and payment for their lands under the act to "extend the provisions of the pre-emption laws "to the territory of Colorado, and for other pur- "poses, approved July 14, 1870, and by instruc- "tions from the general land office under date "July 30, 1870, shall have twelve months addi- "tional time given them under which to make "such proof and payment."

The instructions from the general land office, under date July 30, 1870, are as follows:

"PUBLIC NOTICE No. 742.

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"July 30, 1870.

"The following is an act approved July 14, "1870, to extend the provisions of the pre-emp- "tion laws to the territory of Colorado, and for "other purposes. * * *

"This act leaves the provisions of law as "heretofore respecting 'offered lands,' viz: "filing within thirty days and payment within "twelve months after settlement.

"The settler on surveyed 'unoffered land' "must file his or her declaratory statement "within three months from the date of his or her "settlement on such land, and within eighteen

"months from the expiration of said three "months, make the proper proof, and pay for "such land.

"Where settlers had already filed before the "passage of the act, they are required to make "proof and payment within one year from such "passage; therefore, all filings made prior to that "date will expire, by limitation of law, upon "unoffered lands, on the 14th of July, 1871.

"The settler on 'unsurveyed lands' must file "his or her declaratory statement within three "months from the date of the receipt at the dis- "trict land office of the approved plat of the "township embracing the tract upon which he "or she has settled, and, within eighteen months "from the expiration of said three months, make "the proper proof, and pay for such tract. The "proviso of the act of June 2, 1862, requiring "filing within six months from survey in the field, "and providing for filing with the surveyor gen- "eral, is repealed.

"Circular instructions to registers and receiv- "ers, giving more specific details, will shortly be "issued. In the meantime, those officers will "be governed by this notice.

Jos. S. Wilson,
Commissioner.

Copp's Pub. Land Laws, 291.

A "settler" is "one who personally occupies and resides on, or personally occupies and uses the public lands."

Pre-emptions, 3 Op. Atty. Gen. 129, 130.

Southern Pacific R. R. Grant, 16 Op. Atty. Gen. 88.

Kansas & Neosho Valley R. R. Lands, 16 Op. Atty. Gen. 183.

Peterson v. *First Div. St. P. & P. R. R. Co.*, (Minn.) 6 N. W. Rep. 615, 617.
John Russell, Copp's Pub. Land Laws 262.

And the extension of time within which to prove up, by the joint resolution of March 3, 1871, was restricted to those who were occupying the lands, as required by the pre-emption law.

Scott having abandoned the land in 1869, was not a "settler" within the meaning of the joint resolution; and could not avail himself of its provisions. His filing, therefore, expired by limitation of law, July 14, 1871; that is, his *preference* right to enter the land terminated. It is possible that, had no other right or claim intervened, he could still have entered the land.

Lansdale v. *Daniels*, 100 U. S. 113.
Megerle v. *Ashe*, 33 Cal. 83, 91-2.
Damrell v. *Meyer*, 40 Cal. 170.
Schiefferly v. *Tapia*, (Cal.) 8 Pac. Rep. 878.

But the *preference* right, the essential element of a pre-emption claim or right, expired at the time fixed in the act of July 14, 1870, within which the entry should have been made. It was fully enjoyed at the expiration of that time, whether the entry was made or not, and the land became again free from the pre-emption claim or right.

J. B. Raymond, 2 L. D. 854.
Sanford v. *Sanford*, 139 U. S. 648.

The right to enter the land, after the expiration of the time limited by law, if no other claim or right intervened, was a mere privilege given to

the settler who in all other respects complied with the pre-emption law. It was precisely the same privilege he would have had had he never filed a declaratory statement, but otherwise complied with the law.

Ellen Barker, 4 L. D. 514.

And it no more operates to attach a claim or right to the land, which would exclude it from the grant, than did the privilege which the general public enjoyed of entering, by private purchase, all "offered" lands, operate to attach a claim or right sufficient to exclude such lands from the grant. Moreover, Scott having abandoned the land, did not have even a privilege of purchasing it.

After the expiration of the time limited by law within which to make the entry, the declaratory statement, having served its purpose, is *functus officio*. And it has never been the practice of the department to formally cancel such expired filings, or expunge them from the records. Thus Scott's filing still appears of record, although the land has been patented.

Mr. Commissioner Butterfield, on April 8, 1851, said:

> "The land in question was reserved for the "Mobile & Chicago railroad under act twentieth "September, 1850, subject alone to existing "rights. The failure of the party to prove up "his claim in due time, forfeits what claim he "might otherwise have had, and it would be a "great stretch of power on the part of this office, to

"interfere with the disposition of the land, under "the act of September 20, 1850, and give it to "Mr. Thatcher on the twenty-eighth February, "1851, because he might probably have secured "it, as a pre-emptor, if he had filed the neces- "sary testimony prior to the twentieth February, "1851." Pre. Record, Vol. 26, 276-77.

November 26, 1860, Attorney General Black said:

"His failure for three years to make the nec- "essary proof and payment, takes away what- "ever equity there might have been in his case. "Had he complied with the law in matters of sub- "stance, the mistake (if it was one) in his "declaratory statement would probably have "been discovered and corrected. To approve "this claim now, would be to make it good at the "expense of overthrowing an intervening title, "which we are not authorized to do. The rail- "road company took a grant of it in 1857, dur- "ing the lifetime of Lutz, and when the land, in "consequence of his default, was subject to the "entry of any other purchaser."

Claim of Lutz's heirs, 9 Opinions Attorney General, 515.

In circular of September 8, 1873, Commissioner Drummond says:

"By the operation of law limiting the period "within which proof and payment must be "made in pre-emption cases, such claims are "constantly expiring, the settler not appearing "within such time to consummate his entry. "These expired filings are classed with those "actually abandoned or relinquished."

1 Copp's L. O. p. 29.

In circular of November 7, 1879, the department says:

"Where application is made by a railroad company to select lands on which pre-emption filings have heretofore been made and canceled, or where the same have expired by limitation of law, no other claim or entry appearing of record, you will admit the selections, in accordance with the rules governing in the premises herein communicated. No proofs by the companies concerning such claims will hereafter be required."

6 Copp's L. O. 142.

January 13, 1885, the secretary of the interior said:

"If a selection embraces land subject to pre-emption or homestead, the law requires any settler intending to claim the land to put his or her claim of record within a prescribed period of thirty days or three months from settlement, depending upon the condition of the tract, as 'offered' or 'unoffered' land. If no adverse claim be filed under the law, the selection is entitled to approval. * * * Respecting lists three and four, the reason given by the register and receiver is not sufficient to authorize their rejection. An 'expired pre-emption filing' is no bar to receipt of an application for public lands, nor for suspension of an entry, and is never considered as a bar to issue of patent. Nor is it the practice to enter formal cancellation of such filings upon the books, nor take any action concerning them. They are simply treated as abandoned claims."

State of Alabama, 3 L. D. 317.

In circular of June 4, 1885, it is said:

"It is also held by the department that expired "D. S. filings are to be regarded as abandoned "claims, not requiring to be formally canceled "on the records."

3 L. D. 577.

See also:

Caldwell v. *M. K. & T. R. R. Co.*, 8 L. D. 570.

Allers v. *N. P. R. R. Co.*, 9 L. D. 452.

N. P. R. R. Co. v. *Stovenour*, 10 L. D. 648.

N. P. R. R. Co. v. *Moling*, 11 L. D. 140.

Kricklan v. *St. P. & S. C. R. R. Co.* 13 L. D. 22.

N. P. R. R. Co. v. *Flett*, 13 L. D. 619.

Meister v *St. P., M. & M. R'y Co.*, 14 L. D. 624.

Tetreault v. *N. P. R. R. Co.*, 15 L. D. 552.

The decisions of the courts are to the same effect.

Schiefferly v. *Tapia*, (Cal.) 8 Pac. Rep. 878.

N. P. R. R. Co. v. *Meadows*, 46 Fed. Rep. 254.

Cahalan v. *McTague*, 46 Fed. Rep. 251.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 67, 71.

Keane v. *Brygger*, (Wash.) 28 Pac. Rep. 653.

This construction is in harmony with the plain intention of congress in these grants. That intention was, not to exclude lands from the grant upon forfeited and abandoned filings, but to protect existing rights.

Ryan v. *C. P. R. R. Co.* 5 Saw. 264.

Emslie v. *Young*, 24 Kans. 741.
Young v. *Goss*, (Kas.) 22 Pac. Rep. 572.

The land in question was, therefore, public land, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights February 21, 1872.

POINT II.

THE LAND IN CONTROVERSY WAS RESERVED FROM SALE, PRE-EMPTION OR ENTRY, EXCEPT BY THE RAILROAD COMPANY, FROM AND AFTER FEBRUARY 21, 1872, AND M'LEAN'S ENTRY THEREOF WAS VOID.

The sixth section of the act of July 2, 1864, provides as follows:

> "Section 6. That the president of the "United States shall cause the lands to be sur- "veyed for forty miles in width on both sides of "the entire line of said road, after the general "route shall be fixed, and as fast as may be "required by the construction of said railroad; "and the odd sections of land hereby granted "shall not be liable to sale, or entry, or pre-emp- "tion before or after they are surveyed, except "by said company as provided in this act; but "the provisions of the act of September, eighteen "hundred and forty-one, granting pre-emption "rights, and the acts amendatory thereof, and of "the act entitled 'An act to secure homesteads "to actual settlers on the public domain,' "approved May twenty, eighteen hundred and "sixty-two, shall be and the same are hereby, "extended to all other lands on the line of said "road, when surveyed, excepting those hereby "granted to said company. And the reserved "alternate sections shall not be sold by the gov- "ernment at a price less than two dollars and "fifty cents per acre when offered for sale."

The legal effect of this section is to forbid the sale, pre-emption or entry of the odd-numbered sections of non-mineral public land, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, within forty miles on each side of the line of general route, after the general or preliminary route shall be fixed, by filing a map thereof with the commissioner of the general land office.

Buttz v. *N. P. R. R. Co.*, 119 U. S. 72.

St. P. & P. R'y Co. v. *N. P. R. R. Co.*, 139 U. S. 17.

U. S. v. *S. P. R. R. Co.*, 146 U. S. 599, 600.

Denny v. *Dodson*, 32 Fed. Rep. 909.

U. S. v. *N. P. R. R. Co.*, 41 Fed. Rep. 847.

N. P. R. R. Co. v. *Barden*, 46 Fed. Rep. 604.

N. P. R. R. Co. v. *Cannon*, 3 C. C. A.

N. P. R. R. Co. v. *Sanders*, 1 C. C. A. 204.

S. P. R. R. Co. v. *Orton*, 32 Fed. Rep. 468.

U. S. v. *McLaughlin*, 30 Fed. Rep. 155.

U. S. v. *Curtner*, 38 Fed. Rep. 8.

S. P. R. R. Co. v. *Wiggs*, 43 Fed. Rep. 333.

N. P. R. R. Co. v. *Lilly*, (Mont.) 9 Pac. Rep. 116.

U. S. v. *N. P. R. R. Co.* (Mont.) 12 Pac. Rep. 770.

This reservation from sale, pre-emption or entry, takes effect *eo instanti* upon filing the map of general route in the office of the commissioner of the general land office.

Buttz v. *N. P. R. R. Co.*, 119 U. S. 72.

St. P. & P. R. R. Co. v. *N. P. R. R. Co.*, 139 U. S. 18.

Denny v. *Dodson*, 32 Fed. Rep. 909.
S. P. R. R. Co. v. *Orton*, 32 Fed. Rep. 468.

The company fixed the general route of its road opposite the land in controversy February 21, 1872, * and the land being then non-mineral, public land, free from claims or rights, and within forty miles of the route so fixed, it became at once subject to the provisions of the sixth section, forbidding its sale, pre-emption or entry except by the railroad company. The attempted entry of McLean, made May 3, 1872, being for land reserved from entry, was void.

Hamblin v. *Western Land Co.* 13 Sup. Ct. Rep. 353.
U. S. v. *Des Moines R. R. Co.*, 142 U. S. 528.
Bullard v. *Des Moines R. R. Co.*, 122 U. S. 176.
St. P. & P. R. R. Co. v. *N. P. R. R. Co.*, 139 U. S. 18.
Buttz v. *N. P. R. R. Co.*, 119 U. S. 73.
Van Wyck v. *Knevals*, 106 U. S. 367.
S. P. R. R. Co. v. *Wiggs, et al*, 43 Fed. Rep. 335.
U. S. v. *Curtner*, 38 Fed. Rep. 1.
S. P. R. R. Co. v. *Orton*, 32 Fed. Rep. 468.
Denny v. *Dodson*, 32 Fed. Rep. 909.
McLaughlin v. *Menotti*, (Cal.) 26 Pac. Rep. 881.
Wilcox v. *Jackson*, 13 Pet. 512, *et seq.*
Stoddard v. *Chambers*, 2 How. 317-8.
Doolan v. *Carr*, 125 U. S. 624-5.
Best v. *Polk*, 18 Wall. 117.

* Record 39.

POINT III.

THE ACT OF CONGRESS APPROVED APRIL 21, 1876, ENTITLED "AN ACT TO CONFIRM PRE-EMPTION AND HOMESTEAD ENTRIES OF PUBLIC LANDS WITHIN THE LIMITS OF RAILROAD GRANTS IN CASES WHERE SUCH ENTRIES HAVE BEEN MADE UNDER THE REGULATIONS OF THE LAND DEPARTMENT," DOES NOT AFFECT THE RESERVATION CREATED BY THE SIXTH SECTION OF THE ACT OF JULY 2, 1864, AND DID NOT OPERATE TO CONFIRM OR CURE THE ATTEMPTED ENTRY OF M'LEAN.

The first two sections (the only sections material in this case) of the act approved April 21, 1876, 19 Stat. 35, entitled "An act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the land department," provide as follows:

"Section 1. That all pre-emption and home-
"stead entries, or entries in compliance with
"any law of the United States, of the public
"lands, made in good faith, by actual settlers,
"upon tracts of land of not more than one hun-
"dred and sixty acres each, within the limits of
"any land grant, prior to the time when notice
"of the withdrawal of the lands embraced in
"such grant was received at the local land office
"of the district in which such lands are situated,
"or after their restoration to market by order of
"the general land office, and where the pre-emp-
"tion and homestead laws have been complied
"with, and proper proofs thereof have been
"made by the parties holding such tracts or par-
"cels, they shall be confirmed, and patents for
"the same shall issue to the parties entitled
"thereto."

"Section 2. That when at the time of such "withdrawal as aforesaid valid pre-emption or "homestead claims existed upon any lands "within the limits of any such grant which "afterwards were abandoned, and, under the "decisions and rulings of the land department, "were re-entered by pre-emption or homestead "claimants who have complied with the laws "governing pre-emption or homestead entries, "and shall make the proper proofs required "under such laws, such entries shall be deemed "valid, and patents shall issue therefor to the "person entitled thereto."

The commissioner of the general land office held, in deciding the contest involving this land, that the provisions of the act operated to confirm McLean's entry: * a view which the very able judge of the circuit court sanctions by certain *dicta* in his opinion herein. † We submit that these views are erroneous.

(A.) THE ACT OF APRIL 21, 1876, REFERS TO EXECUTIVE WITHDRAWALS ONLY; AND DOES NOT APPLY TO A RESERVATION CREATED BY ACT OF CONGRESS.

If the act of 1876 is to receive a construction making it apply to legislative reservations, it must be considered as modifying the laws creating such reservations, and, *pro tanto*, repealing them. It contains no words of repeal. It is purely affir-

* "In the case at bar the act of 1876 took the land out of the withdrawal on general route." (Record 34.)

† Record 16, 17, 18.

mative in its language. And if it operates to repeal the provisions of section six of the Northern Pacific grant, and similar provisions in other railroad grants, so as to make the reservation depend upon the purely discretionary act of the executive, instead of the will of congress, it repeals those provisions entirely by implication. Such repeals are not favored; and one act will not be construed to repeal another by implication, if by any reasonable construction the two can stand together.

Wood v. *U. S.*, 16 Pet. 362-3
McCool v. *Smith*, 1 Black 470-1.
State v. *Stoll*, 17 Wall. 431.
Red Rock v. *Henry*, 106 U. S. 601.
Chew Heong v. *U. S.*, 112 U. S. 549-50.
Sutherland on Stat. Const. § 148.

And in carrying out this rule of construction, a general statute will not be construed as repealing a special one, unless there is a plain indication of an intention so to do.

Third National Bank of St. Louis v. *Harrison*, 3 McC. 164.
Ex parte Crow Dog, 109 U. S. 570.
In re Mannfacturers' National Bank, 5 Biss. 502, 508.
State v. *Treasurer*, 41 Mo. 24.
Sutherland on Stat Const. § 157-8-9.

The supreme court, in *Wilcox* v. *Jackson*, 13 Pet. 514-5, construing the act of July 2, 1836, 5 Stat. 73, the provisions of which are very similar to those in the act of 1876, says:

"Now the first remark we make upon this act "is, that, when the previous law had totally "exempted certain lands from the right of pre- "emption, if there were nothing else in the case, "it would be a very strong, not to say strained "construction of this section, to hold that con- "gress meant thereby, by implication, to repeal "the former law in so important a provision."

The charter of the Northern Pacific Railroad Company is a special act; the act of April 21, 1876, is general in its terms; and there being no plain indication in the act of 1876 of an intention to repeal the provisions of the sixth section creating a legislative reservation to take effect *eo instanti* upon fixing the general route, that act will not be construed as having that effect.

The acts are not inconsistent, and both may stand. An analysis of the act of 1876 shows that it refers only to withdrawals made by executive order. It confirms entries made "in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated." It evidently contemplates a case where "notice of the withdrawal" is to be sent to the local land office.

It was the custom of the interior department to withdraw lands for the benefit of railroad grants from sale, entry, pre-emption, or other disposition,

by executive order. Such order it was the duty of the department to send to the registers and receivers of the local land offices, and this was and is designated in the phraseology of the land office as giving "notice of the withdrawal;" and it is to such withdrawal that the act has application. It forbids the construction of such executive order as taking effect from the day it was issued as against parties having a homestead or pre-emption entry upon the land, initiated after such order was sent to the local office, but before it was received, and before the parties could have had notice thereof.

The term "withdrawal" in land office phraseology refers entirely to a reservation created by executive order. Secretary Vilas, speaking of the reservation created by the sixth section of the Northern Pacific act, says:

> "The term 'withdraw,' therefore, is not accurate, and is misleading because it is otherwise employed in the usage of the land office, and then means to withhold from sale lands which would otherwise remain saleable."
>
> *N. P. R. R. Co.* v. *Miller*, 7 L. D. 120.

That congress used the term "withdrawal" in this sense is made certain by the phrase "or after their restoration to market by order of the general land office." The land office has no authority to restore lands to market withdrawn by act of congress. The department had jurisdiction to revoke its own orders of withdrawal, and restore lands withdrawn by executive order to market,

but its jurisdiction extended no further; and it is obvious from the context, and the juxtaposition of the phrases "notice of the withdrawal of the lands embraced in such grant was received at the local land office," and "or after their restoration to market by order of the general land office," that the restoration referred to, is a revocation of such a withdrawal as is referred to in the first phrase.

This construction of the act harmonizes and renders clear the terms therein used, which, else, must be taken as used with utter disregard for their ordinary and proper meaning. Thus the term "public lands."

> "The words 'public lands' are habitually used "in our legislation to describe such as are sub- "ject to sale or disposal under general laws."
>
> *Newhall* v. *Sanger*, 92 U. S. 763.

And it is not reasonable to suppose that congress in confirming entries made in "compliance with any law of the United States, of the public lands" intended to confirm an entry made upon land which by its own act it had taken out of the category of "public lands," and declared should not be subject to such entry. Nor could an entry on such reserved land be deemed an entry "in compliance with any law of the United States." An act in compliance with means in conformity with. And it certainly is a strained construction to hold that congress intended by this language to confirm an entry made, not in

compliance with, but against the express prohibition of the law.

Stoddard v. *Chambers*, 2 How. 317.

Wilcox v. *Jackson*, 13 Pet. 514.

It should be further noted that the act provides that the entries shall be "confirmed." The use of the word "confirm" is significant. It means to complete or establish that which was imperfect or uncertain. A confirmation is a species of common law conveyance. It is defined as a deed whereby a conditional or voidable estate is made absolute and inviolable by the confirmant, so far as he is able, or whereby a particular estate is increased.

Smith's Real Property, referring to Coke Lit., 295 B. and 2 Bl. Comm. 325.

An entry made upon lands reserved by act of congress does not create an imperfect or voidable estate, but creates no estate whatever. It is not voidable, but void *ab initio*.

Smelting Co. v. *Kemp*, 104 U. S. 641.

Steele v. *Smelting Co.*, 106 U. S. 452-3.

Doolan v. *Carr*, 125 U. S. 624, *et seq.*

S. P. R. R. Co. v. *Wiggs*, 43 Fed. Rep. 330.

And it is not to be presumed that congress, in using the term "confirmed" intended thereby to create an estate out of an entry which its own acts declared absolutely void. And although a homestead or pre-emption entry made upon lands reserved by order of the president was also forbidden by act of congress, the term "confirmed" is correctly used, for the reason that the act was a

legislative construction of prior orders of withdrawal. It is a legislative declaration that such orders of withdrawal are not effective until notice thereof is given to the local land office, and that entries made prior to such time were rightfully made, and are, by the act, confirmed.

This interpretation of the act has, with the exception of the opinion of the court below, received the uniform sanction of the courts called to pass upon it.

Taboreck v. *R. R. Co.*, 13 Fed. Rep. 105.

B. & M. R. R. Co. v. *Lawson*, (Iowa) 12 N. W. Rep. 231.

A. T. & S. F. R. R. Co. v. *Bobb*, 24 Kas. 673.

Emslie v. *Young*, 24 Kas. 743.

(B.) McLEAN WAS NOT AN "ACTUAL SETTLER;" AND HIS ENTRY IS NOT WITHIN THE CLASS REFERRED TO IN THE ACT OF 1876.

"Filings and entries made in good faith by "actual settlers are the only class of claims con- "firmed and made valid by said act."

McClure v. *N. P. R. R. Co.*, 9 L. D. 155.

Offut v. *N. P. R. R. Co.*, 9 L. D. 407.

Olney v. *H. & D. R. R. Co.* 10 L. D. 136.

Bond's Heirs, et al v. *Deming Townsite*, 13 L. D. 668.

It is not shown, or attempted to be shown, that McLean ever settled upon this land. The burden of making such showing rests upon the plaintiff in error; and in the absence of evidence it will not be presumed that such settlement was made.

McClure v. *N. P. R. R. Co.*, 9 L. D. 155.
Offut v. *N. P. R. R. Co.*, 9 L. D. 407.
Patterson v. *Tatum*, 3 Saw. 170.
Brown v. *Corson*, (Ore.) 19 Pac. Rep. 73.

The settlement is not required in advance of entry by the homestead law. A homestead entry is made for the purpose of settlement, and should precede the settlement.

Rev. Stat. 2290.
A. T. & S. F. R. R. Co. v. *Mecklim*, 23 Kas. 174.
Burnham v. *Starkey*, (Kas.) 21 Pac. Rep. 628.
Circular of August 25, 1866, 2 Lester's Land Laws, 261.
Tobias Beckner, 6 L. D. 134.

And the settled doctrine of the department is that it is sufficient if settlement be made within six months after entry.

Waldo v. *Schleiss*, Copp's Pub. Land Laws 234.
Frank W. Hewit, 8 L. D. 566.

And no presumption can arise from the allowance of the entry, of the existence of a fact which was not material to such allowance; and which the entryman was not required to, and did not, attempt to show.

It does not appear, therefore, that this entry came within the provisions of the act of 1876, even if it be conceded that act applied to the legislative reservation created by the sixth section of the act of July 2, 1864.

POINT IV.

M'LEAN'S ENTRY WAS CANCELLED; AND THEREBY ANY CLAIM OR INTEREST HE MIGHT OTHERWISE HAVE HAD IN OR TO THIS LAND, WAS EXTINGUISHED.

(A.) The right of McLean was extinguished December 1, 1874.

December 1, 1874, the commissioner of the general land office wrote the register and receiver of the Helena land office, that the entry of McLean was held for cancellation because made subsequent to the time the right of the railroad company attached to the land. *

We submit that this is evidence of an adjudication and determination that McLean's entry was improperly allowed; and that thereby any claim or right he might otherwise have had, was extinguished.

(B.) The cancellation of McLean's entry, September 11, 1879.

By section 2291 of the Revised Statutes it is provided that no certificate or patent for land entered under the homestead act, shall issue until the expiration of five years from the date of entry; "and if at the expiration of such time, *or at any time within two years thereafter*," the entryman makes the prescribed proof of compliance with the provisions of the act, he is entitled to a patent for the land. The law vests in the

* Fourteenth finding, Record 40.

entryman a right to the patent only when the proof is made more than five and within seven years from the date of entry. If it be not made within that period, it is without effect. Neither the interior department nor the courts are authorized to disregard this provision and extend the time.

Christy v. *Siegel*, 9 Copp's L. O. 149.
John C. Mounger, 9 L. D. 291.
Megerle v. *Ashe*, 33 Cal. 83.

(*a.*) And the department is authorized to cancel the entry at the expiration of seven years, without any notice to the entryman whatever. The law itself is notice. The entryman knows, as a matter of law, that his entry must be consummated within seven years, or not at all. If it is not so consummated, the department is not only authorized, but it is its duty to cancel the entry. If the effect of this provision of the statute is not to restore the land entered to the public domain at the expiration of seven years without final proof, without any action by the department whatsoever, (as we think it is) the land remains reserved and withdrawn from disposition in any manner, until the entry is formally cancelled; it is not susceptible of final entry by the entryman nor can anyone else acquire an interest therein. Such a state of affairs was not contemplated by congress. And the due administration of the public lands requires that such obstacles to the disposition of the land, should be removed. To require the United States to go into the courts

for the purpose of clearing from the records these evidences of a right which, if it ever existed, has become forfeited by a failure to comply with the law in regard to making final proof, can serve no purpose; and the delays attendant thereon would greatly cripple the efficiency of the department. It was not the intention that such action should be taken. The power of supervision over the public domain vested in the interior department is ample to enable it to expunge from the records these forfeited entries, and restore the lands to the public domain.

Lee v. *Johnson*, 116 U. S. 52.
Galliher v. *Cadwell*, 145 U. S. 369, 374.
U. S. v. *Steenerson*, 1 C. C. A. 559.
Swigart v. *Walker*, (Kas.) 30 Pac. Rep. 162.

And this power the department has exercised without question since the enactment of the homestead law.

(*b.*) The entry was not cancelled without notice. Whether essential or not, it was given; and McLean afforded opportunity to explain his negligence if he could.

The evidence establishes that neither the order to show cause addressed to McLean by the register and receiver of the Helena land office, nor any copy thereof, can be obtained. *

* "Plaintiff then offered in evidence a certified copy of a letter dated July 3rd, 1879, signed by the register and receiver of the United States Land Office at Helena, Montana, and addressed to the Honorable Commissioner of the general land office, Washington, D. C., for the purpose of showing that McLean had been duly notified to appear and show cause why his entry should not be cancelled, the defendant, Maria Amacker, having been required to pro-

And the letter to the register and receiver of July 3, 1879, is the best evidence procurable as to the fact that an order, purporting to be an order to show cause within thirty days from June 2, 1879, why his entry should not be cancelled, was

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duce the notice mentioned in said letter, and having failed to find any such paper among the papers of her late husband, William McLean, which said letter is as follows, to-wit:

United States Land Office,
HELENA, Montana, July 3, 1879.

Hon. Com. Gen'l Land Office, Washington, D. C.

Sir: We have the honor to report that June 2nd, 1879, the applicants to the following homestead entries were duly notified in accordance with your circular of December 20th, 1873, to show cause within thirty days from date of said notice, why their entries should not be cancelled, and up to this date no action has been taken.

* * * * * * * * * *

No. 819, William McLean, W½ NW¼, SE¼ NW¼, and SW¼ NE¼ sec. 17, 10 N., 3 W., made May 3, 1872.

* * * * * * * * * *

We would respectfully recommend that these homestead entries be cancelled.

Very respectfully,
J. H. MOE, Register,
(Record 25.) F. P. STERLING, Receiver.

Q. Mr. Borquin will you please state the method of issuing an order to show cause why an entry should not be cancelled in the land office, and whether you are able to keep copies of such notices in the land office, and if not, why not?

A. When the time arrives that notice should be given, we issue a notice on a printed blank. The form is printed and we fill in the names of the different entrymen, and this sent to the parties by registered mail, no copy being retained in the office. No copies are preserved. I believe you asked me for a copy of notice of cancellation, cancelling the entry of— to produce certified copy of letter sent to William McLean, dated June 2, 1879, directing him to show cause within thirty days whether his homestead entry for this land should not be cancelled, and I made a thorough search and satisfied myself it was not of record.

On cross examination the witness testified as follows:

"I do not know that any such notice was ever sent out of my office. I would only know what the records show. I have never seen any such record; and I do not know what the custom of the department was with my predecessors. When the paper is sent out by registered mail we receive a receipt, and send it to the depart-

sent to McLean. It was, under the circumstances, admissible for the purpose of showing that an order had been sent. Further, this letter was an official return made by the officers of the local office to the commissioner, in the course of their duties, as prescribed by the circular of December 20, 1873, and the recital of service, being the recital of an official act, made in a report of such act which they were, by the rules of the department, required to make, is admissible for the purpose of showing that such notice was served.

Starkweather v. *Morgan*, 15 Kan. 275.

No objection was made to the sufficiency of the letter to establish that fact. The objection offered was that the evidence offered was not competent to show that the notice sent was legally sufficient—"that Mr. McLean was *duly* notified." The letter shows that the notice purported to issue in accordance with the circular of December 20, 1873. The court will take judicial knowledge of this circular.

Elling v. *Thexton*, (Mont.) 16 Pac. Rep. 934.

U. S. v. *Williams*, (Mont.) 12 Pac. Rep. 853.

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ment as evidence that the notice has been served. The letter transmitting it is the only record we have. We make no other entry." (Record 28).

As a rule of law shown to have existed, is, in the absence of evidence to the contrary, presumed to continue; so, conversely, it will be presumed that the custom of issuing notices from the local office, shown to obtain now, obtained in 1879, when the notice to McLean issued. And under the statute of Montana, the court will take judicial knowledge that such is the fact.

By this circular a form of notice is prescribed.* It was the official duty of the district officers to send out the notice in that form to McLean. And as the evidence establishes that an order

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* CIRCULAR.

Department of the Interior,
General Land Office.
Dec. 20, 1873.

Gentleman: In a number of cases, persons who have initiated titles to the public lands under the homestead law have allowed the limitation provided by the statute to expire without making the final proof of settlement and cultivation required by that act.

Therefore, in all such cases as now exist in your district, or may hereafter arise, you will notify the parties of their non-compliance with the law, and that thirty days from date of service of notice will be allowed to each of them within which to show cause why their claims shall not be declared forfeited and their entries cancelled. At the expiration of that time you will report the reasons given, or, in case of failure, report that fact, so that in either event proper action may be had by this office. But you will in no case allow the lands embraced in such claims to be re-entered until you shall have received from this office a formal notice that the original entries have been positively cancelled. I append a form of notice which you will be pleased to adopt.

Very respectfully,
WILLIS DRUMMOND,
Commissioner.

Registers and Receivers, United States Land Offices.

FORM OF NOTICE.

A ——B——, (place of residence, or, that being unknown, address to the post office nearest to the land).

Sir: You are hereby notified that the homestead law requires final proof of settlement and cultivation to be made within two years after the expiration of five years from date of entry, and that in case of your entry No.—, for ——dated ——, the time fixed by the statute has expired without the requisite proof being filed by you. You will, therefore, within thirty days from date of service of this notice, show cause before us why your claim shall not be declared forfeited and your entry cancelled for non-compliance with the requirements of the law, so that the case may be reported to the commissioner of the general land office, for the proper action.

....., Register.

....., Receiver.

(Date)

(Copp's Pub. Land Laws 244.)

to show cause was, in fact, sent, the presumption is that the form of notice complied with the form which the departmental regulations made it the duty of the officers to use.

Lawson on Presumptive Evidence, chap. 3.
Cofield v. *McClelland*, 16 Wall. 334.
Bank of U. S. v. *Dandridge*, 12 Wheat. 69-70.
Upham v. *Hosking*, 62 Cal. 259.
Baldwin v. *Bornheimer*, 48 Cal. 433.
King v. *Whiston*, 4 Ad. & Ell. 607, 610-1.

Indeed, since by the circular it was made the duty of the register and receiver to issue to McLean immediately upon the expiration of seven years from the date of entry, an order to show cause why his entry should not be cancelled, it would be presumed from the fact that the entry was cancelled, that this duty was duly performed.

Cases cited, *supra*.

September 11, 1879, the entry was formally cancelled of record. * By this act the land,

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* Sept. 11, 1879.

Register and Receiver,
HELENA, Monrana T.

Gentlemen: I am in receipt of your letters of June 4 and July 3, last, stating that the applicants in the following homestead entries were duly notified in accordance with the circular of December 20, 1873, to show cause why their entries should not be cancelled, and that no action has been taken by them, and recommending the cancellation of said entries, viz.:

* * * * * * * * * *

No. 819, made May 3, 1872, by William McLean, W½NW¼, SE¼ NW¼ and SW¼ NE¼, 17, 30 N. 3 W.

* * * * * * * * * *

In view of the fact that the above entries were held for cancellation in November and December, 1874, and of the further facts that the parties have allowed the limitation provided by statute to

whatever its previous condition, was restored to the public domain and rendered subject to disposition under the general land laws.

Galliher v. *Cadwell*, 145 U. S. 368, 374.

POINT V.

THE ACT OF CONGRESS APPROVED JUNE 15, 1880, DID NOT VEST ANY RIGHT OR CLAIM TO SAID LAND IN FAVOR OF WILLIAM M'LEAN OR HIS WIDOW, OR RESERVE THE SAME, OR ATTACH ANY RIGHT OR CLAIM THERETO.

By an act approved June 15, 1880, 21 Stat. 237, entitled "An act relating to the public lands of the United States," congress provided:

> "Section 1. That when any of the lands of "the United States shall have been entered and "the government price paid therefor in full no "criminal suit or proceeding by or in the name "of the United States shall thereafter be had or "further maintained for any trespasses upon or "for or on account of any material taken from "said lands and no civil suit or proceeding shall "be had or further maintained for or on account "of any trespasses upon or material taken from "the said lands of the United States in the or-"dinary clearing of land, in working a mining "claim or for agricultural or domestic purposes "or for maintaining improvements upon the land

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expire without making final proof as required, and have failed to establish their claims after due notice given, the said entries are hereby cancelled.

* * * * * * * * * *

Advise the parties in interest.

Very respectfully,

J. M. ARMSTRONG,
Acting Commissioner.

(Record 26.)

"of any *bona fide* settler or for or on account of "any timber or material taken or used by any "person without fault or knowledge of the tres- "pass or for or on account of any timber taken "or used without fraud or collusion by any per- "son who in good faith paid the officers or agents "of the United States for the same or for or on "account of any alleged conspiracy in relation "thereto; *Provided*, that the provisions of this "section shall apply only to trespasses and acts "done or committed and conspiracies entered "into prior to March first, eighteen hundred and "seventy-nine; *And provided, further*, that de- "fendants in such suits or proceedings shall ex- "hibit to the proper courts or officers the evi- "dence of such entry and payment and shall pay "all costs accrued up to the time of such entry."

"Section 2. That persons who have hereto- "fore under any of the homestead laws entered "lands properly subject to such entry, or per- "sons to whom the right of those having so en- "tered for homesteads, may have been attempted "to be transferred by *bona fide* instrument in "writing, may entitle themselves to said lands by "paying the government price therefor, and in "no case less than one dollar and twenty-five "cents per acre, and the amount heretofore paid "the government upon said lands shall be taken "as part payment of said price: *provided*, this "shall in no wise interfere with the rights or "claims of others who may have subsequently "entered such lands under the homstead laws."

It is urged by plaintiff in error that the second section of this act operated to vest in McLean, and, after his death, in his widow, a right to purchase this land, which right was sufficient to exclude it from the grant. And this proposition of

law is set up as the basis for the secretary's decision in the contest before the department relative to this land. *

(A.) The entry of McLean is not within the terms of the act.

The act authorizes the purchase, only when the lands entered were "lands properly subject to such entry." We have seen that the land in question was reserved for the railroad company prior to McLean's attempted entry. It was not, therefore, "land properly subject to such entry."
Florida C. & P. R. R. Co. v. *Carter*, 14 L. D. 103.

(B.) The right of purchase conferred by the act was a mere privilege, which, until exercised, attached no right or claim to the land.

Was it the intention of congress by the second section of the act to vest in every person who had theretofore, under any of the homestead laws, entered land properly subject to such entry, an interest in the tract so entered, although the original entry was fraudulently made, or had been abandoned, and although it had been cancelled, because of such fraud or abandonment, ten or fifteen years, it may be, before? If such is the effect of this act, that intent necessarily takes such lands out of the category of public lands. It operates to deprive congress of the power to ap-

* Record 36-7.

propriate such lands for any of the numerous public purposes for which such property may be used by the government. It must reserve such land from sale, private entry or any other disposition, save, possibly, under the homestead act. And, since only public lands, and lands which were subject to entry under the pre-emption acts, are, by the terms of the homestead law, subject to entry under that law, and no rights or claims can be acquired to other lands thereunder, it must be held that, if the effect of the act of June 15, 1880, was to create any interest in the land originally entered and vest the same in the entryman, it operated absolutely to reserve such lands for the original entryman. The absence of limitation of time within which the entryman must make the payment, coupled with the fact that when made it would necessarily cut off all rights attaching subsequent to the date of the act, would operate, practically, to do away with the necessity of payment, since no party would settle upon, improve or seek to acquire any adverse interest in land the legal title of which was subject to be acquired at any time by the original entryman; and that entryman could thus use the land quite as well as if he had the fee, while he would be subject to none of the burdens incident to ownership.

And so, if the privilege of purchasing conferred is a preference or pre-emption privilege. If such be the construction of the act, this perpetual preference would operate equally with an

interest to reserve the land. The United States could not vest in any but the original entryman, or the person to whom he may have attempted to transfer his rights, the title to such land. If another sought to enter land upon which there had once been an entry under any of the homestead laws, improved and finally obtained a patent therefor, under the pre-emption law, by cash entry, or in any other manner than by the homestead law, the original entryman could, at any time, by exercising his preference right, acquire the better right to the land, and defeat the subsequent patent.

Pre-emptions to First Settlers, 2 Op. Atty. Gen. 367.

Pre-emptions, 3 Op. Atty. Gen. 187, 188.

Claim of Belding's Heirs, 10 Op. Atty. Gen. 56

Only very clear language would justify attributing to congress an intention thus to place the public lands beyond its control, and vest in an entryman whose conduct had not been such as to entitle him to the benefits of the homestead laws, rights far superior to any conferred by such homestead laws upon those honestly complying with their provisions.

The Yosemite Valley Case, 15 Wall. 86-7.

The language of the act does not require that such a construction should be given to its provisions. A construction of its terms as simply giving the privilege of purchasing land previously entered, if at the time of purchase such land was

public and there were no intervening rights or claims attaching thereto, gives full effect to all its provisions, is sustained by the history of the act, is in accord with the departmental interpretation thereof, and is supported by the few decisions wherein its terms have been construed.

The words "may entitle themselves" are not indicative of an intention to grant either an interest in the land or a preference right of purchase. The act does not make the right to purchase contingent upon the performance of any further act by the person seeking to avail himself of its provisions. It does not prescribe any limitation of time within which that right should be exercised. Under these circumstances the use of words in the present potential mode, indicating a mere possibility, is not consistent with an intention to vest an absolute claim to the land which should take precedence. They are words of permission, not of grant. Where the intention has been to grant a preference right or interest, the indicative mode has been uniformly employed.

It is further a noticeable fact that when congress has given a preference right of entry, it has invariably designated that right in terms as a pre-emptive or preference right. This uniform custom, coupled with the absence of such terms here, is significant that it was not, in this case, the intention to confer such pre-emption right.

Galliher v. *Cadwell*, 145 U. S. 371.

The proviso, indeed, forbids an interpretation of this act as conferring a preference right of purchase. It expressly contemplates the initiation of rights and claims which shall defeat the right of purchase. The purpose of this provision is to protect those inchoate rights and claims, such as a declaratory statement, which, not being vested rights, and insufficient to take the land out of the category of public lands, might otherwise be defeated by the purchase authorized by the act. The term "homestead laws" in the proviso is a generic term, and is intended to embrace all rights or claims that may have intervened prior to the application to purchase.

Circular of Instructions of October 9, 1880, 7 Copp's L. O. 142.
William White, 1 L. D. 55.
George W. Bishop, 1 L. D. 69.
Samuel M Mitchell, 1 L. D. 97.
Pomeroy v. *Wright*, 2 L. D. 164.
Charles W. Martin, 3 L. D. 373.
Freise v. *Hobson*, 4 L. D. 580.
Lyons v. *O'Shaughnessy*, 5 L. D. 606.
N. P. R. R. Co. v. *Elder*, 6 L. D. 409.
Clement v. *Henry*, 6 L. D. 641.
Nuttle v. *Leach*, 7 L. D. 325.
Craig v. *Howard*, 7 L. D. 329.
Puckett v. *Kaufman*, 10 L. D. 410.
Havel v. *Havel*, 12 L. D. 320.
Williams v. *Doris*, 13 L. D. 487.

This construction is in accord with the history of the act, as shown by the debates in congress

during its consideration. * Prior to the incoming administration in March, 1879, settlers upon the public lands, those who had made entry as well as mere squatters, timber speculators and others, had been permitted by the policy of the government to cut, upon the public lands, such timber as they desired, and no effort was made to protect the public domain from such waste. Under this passive attitude of the government, such trespasses had acquired gigantic proportions. Millions of feet were cut annually. Such timber, so cut, passed from the hands of the lumber men into those of innocent purchasers. With the new administration, however, commencing in March, 1879, this was changed. The government

* Second session 46th Congress, 10 Cong. Record, 128-9, 1564-1577, 3577-3585, 3627-3632, 4247-4249.

Mr. Converse, chairman of the House Public Lands committee, reporting the bill favorably, said:

"The whole scope of this bill is simply to settle litigation now pending in the United States courts, and other suits which might be brought for trespass upon the public lands. The land which was valued at $2.50 per acre is now worth less than $1.25 per acre where the timber has been taken off of it. The pending proposition simply authorizes those who have been sued, to pay for the land and the costs which have accrued in court, thus allowing the whole business of this litigation to drop. * * *" (p. 129.)

Mr. Herbert of Alabama, who introduced the bill, said:

"The land is not disposed of until the persons to whom the privilege is given to buy the lands shall actually go forward and buy them. * * * Every foot of public land that belongs to the United States now, will belong to the United States after the passage of this bill. * * * It merely lays down rules and prescribes regulations under which lands can be purchased, and then it describes the effect of the purchase of the lands; that is all. All the lands that belong to the United States will belong to it after the passage of this bill, and if persons do not see proper to go forward and enter lands under the bill, all the land will continue to belong to the government as it does now."

adopted strict measures to protect its lands and the timber thereon. Suits were initiated everywhere against parties who had cut timber in the past; and against innocent purchasers, to recover the value of the timber in their hands, as well as against the timber speculators; as well against the homestead and pre-emption settler, who had cut and disposed of timber from the land which he sought to enter, as against timber thieves. In view of the preceding quiet attitude of the government in this matter, which had been construed as a tacit permission to commit these depredations, and for the purpose of protecting those into whose hands such lumber had innocently come, and to protect entrymen who had cut and sold the timber from the land they were seeking in good faith, to enter, the act of June 15, 1880, was passed. In order, however, to render the amnesty available, it was essential that the laws should be so modified as to permit the purchase. Existing laws did not permit such cash entry in all cases. Under the homestead acts, cash purchase could only be made by commuting the entry in accordance with R. S. § 2301, and such commutation could only be made by one whose qualifications, settlement and cultivation were sufficient to authorize entry under the pre-emption acts. To protect entrymen who were not in a position to comply with R. S. § 2301, as well as those to whom the "right of those having so entered for homesteads, may have been attempted to be transferred," and all who could not, under

existing laws, have purchased the lands, was the purpose of the second section of the act of July 15, 1880. It sought to accomplish this result by authorizing the purchase of the lands once entered. It would be strange indeed if congress, in passing an act which was intended only as an act of amnesty to those who were, in the eyes of the law, criminals, should have vested in them a valuable right and interest in the land itself, prior to making such purchase; and in passing an act of amnesty, had placed a reward upon the perpetration of such criminal acts; and had given to such trespassers and others claiming the benefits of this act, a right, which, so far as congress could do it, would be a divestiture of prior vested rights. Such was not the intention of congress.

This construction of the act as conferring a mere privilege of purchasing, a privilege which gives no right or claim to the land in advance of purchase, and does not take the land out of the category of public lands, is the settled construction by the interior department.

In Nathaniel Banks, 8 L. D. 532, Secretary Noble says:

> "It seems to be claimed by counsel in the "motion for review, that a purchase under the "act of 1880 is not a new or original entry, but "a re-instatement and consummation of the "homestead entry, operating by relation from "the date of such entry. The act, however, by "protecting 'all vested rights that might inter-"vene prior to application to purchase' (George "S. Bishop, 1 L. D. 69), expressly deprives the "purchase of any operation by relation as to such

"rights, and there is nothing in the language or "reason of the law, to sustain the position con- "tended for or to indicate that anything more "was intended than the conferring upon a par- "ticular class of persons the right of private cash "entry of certain lands, operative from the date "of such entry."

And see:

N. P. R. R. Co. v. *Mathews*, 15 L. D. 81.

And this construction is sustained by:

Mulloy v. *Cook*, (Ala.) 10 So. Rep. 349.

Galliher v. *Cadwell*, 145 U. S. 369, 374.

S. C. (Wash.) 18 Pac. Rep. 68.

U. S. v. *Perkins*, 44 Fed. Rep. 671.

This unexercised privilege of purchasing is not a claim or right which will exclude land from the grant made by the act of July 2, 1864. It is, in its nature, precisely like the privilege every qualified person has to acquire lands under any of the public land laws. It is no more a claim or right to the land, than is the common privilege of purchasing "offered" lands. As, notwithstanding the existence of the privilege, the land remains open to disposition under the general public land laws, it remains public land in the fullest sense of the word.

Newhall v. *Sanger*, 92 U. S. 763.

And if otherwise within the terms of the grant will pass under an act excluding lands reserved, sold, granted or otherwise appropriated, and not free from pre-emption or other claims or rights.

N. P. R. R. Co. v. *Mathews*, 15 L. D. 81.

Mullroy v. *Cook*, (Ala.) 10 So. Rep. 349.

POINT VI.

DEFENDANT IN ERROR ACQUIRED TITLE TO THIS LAND BY DEFINITELY FIXING THE LINE OF ITS ROAD OPPOSITE THERETO, AND WITHIN FORTY MILES THEREOF, AND FILING A PLAT OF SAID LINE IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, JULY 6, 1882; AND THE PATENT SUBSEQUENTLY ISSUED TO MARIA AMACKER WAS ISSUED FOR LAND ALREADY DISPOSED OF, AND IS VOID.

The grant to defendant in error by act of July 2, 1864, is a grant *in praesenti*; that is, it passes a present title to certain odd numbered sections. What sections are granted can not be ascertained until the line of the road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office. Previous to that time the grant is a float, but immediately upon the occurence of that event, the title to the odd-numbered sections of non-mineral public land, to which the United States has, at that time, full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, vests in the grantee as of the date of the grant.

St. P. & P. R. R. Co. v. *N. P. R. R. Co.*, 139 U. S. 5.

Deseret Salt Co. v. *Tarpey*, 142 U. S. 247.

U. S. v. *S P. R. R. Co.*, 146 U. S. 593.

Wis. Cent. R. R. Co. v. *Price Co.*, 133 U. S. 507-9

After the cancellation of McLean's entry in September, 1879, and until after July 6, 1882, there was no attempt to initiate any claims or rights to this land; and as the act of June 15, 1880, did not operate *proprio vigore* to attach a claim or right thereto, it was, July 6, 1882, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights. And when on that day the railroad company fixed the line of the road opposite thereto, and within forty miles thereof, and filed a plat of such line in the office of the commissioner of the general land office, it *eo instanti* acquired the title to this land, subject only to a forfeiture for breach of the conditions subsequent; a contingency removed by the railroad company's compliance with those conditions. * The title thus acquired is the legal title, as distinguished from the equitable title, and is sufficient to sustain an action in ejectment.

N. P. R. R. Co. v. *Amacker*, 1 C. C. A. 349, 353.

Deseret Salt Co. v. *Tarpey*, 142 U. S. 247, *et seq.*

The title having passed from the United States prior to the time Maria McLean applied to purchase the land, the interior department was without jurisdiction, and had no authority either to accept her money or to do any act in the prem-

* Record, 24, 39.

ises. And the patent issued being for land, the title to which had already passed from the government, was and is void. It did not operate to convey the title to the plaintiff in error, for the government had no title to convey. This fact may be shown in an act on of ejectment equally as in an action in equity; and being established, the patent is no bar to a recovery by the holder of the true title.

N. P. R. R. Co. v. *Amacker*, 1 C. C. A. 353.
N. P. R. R. Co. v. *Cannon*, 46 Fed. Rep. 238.
Wright v. *Roseberry*, 121 U. S. 518, *et seq.*
Iron Silver M. Co. v. *Campbell*, 135 U. S. 286, 292, *et seq.*
Doolan v. *Carr*, 125 U. S. 624, *et seq.*
Francoeur v. *Newhouse*, 40 Fed. Rep. 623.

Further, it may be noted that the patent was issued without authority of law, for the reason that the act of June 15, 1880, does not authorize the purchase of lands by the widow of the entryman.

Gallihcr v. *Cadwell*, 145 U. S. 371.

We submit that the judgment of the circuit court should be affirmed.

FRED M. DUDLEY,
Counsel for Defendant in Error.